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2009

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Angela M. Banks
William & Mary Law School, ambank@wm.edu

Repository Citation
Banks, Angela M., "Sovereignty, Deference, and Deportation: Allocating and Enforcing Immigrants' Rights in the United States and Europe" (2009). *Faculty Publications*. 1837.
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NEW VOICES: ISSUES IN THE HUMAN SIDE OF INTERNATIONAL LAW

This panel was convened at 9:00 am, Friday, March 27, by its moderator, David Kaye of the UCLA School of Law, who introduced the panelists: Angela M. Banks of William and Mary School of Law; Alex Little of the U.S. Attorney's Office for the District of Columbia; Janina Dill of the University of Oxford; and Hari M. Osofsky of Washington and Lee School of Law.[*]

Sovereignty, Deference, and Deportation: Allocating and Enforcing Immigrants' Rights in the United States and Europe

By Angela M. Banks[†]

As international migration continues to rise, the United States and many European states are facing important challenges regarding the scope of states' immigration power and the role of international law in defining that scope.[1] The regulation of membership within a polity is generally regarded as an essential aspect of state sovereignty. Through the immigration power, states determine who can enter, who can reside, under what conditions individuals can reside, who can be deported, and who can become a citizen. Historically, international law has played a prominent role in defining the scope of states' sovereign powers, yet this body of law has rarely regulated state use of the immigration power. The power to deport is a significant power that states hold, particularly with regard to long-term foreign residents who have been granted permission to reside in a state indefinitely. The manner in which a state exercises its deportation power can unsettle the lives of noncitizens, their families, and their communities, which often include citizens. As Justice Brewer stated in his dissenting opinion in *Fong Yue Ting*, "[e]very one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment; and that oftentimes the most severe and cruel."[2] Additionally, the lack of secure residency for long-term foreign residents may also hamper the integration of these individuals within the broader society.[3]

Within the last one hundred years, international legal norms and rules regarding individual rights have changed significantly, which has indirectly limited the scope of states' power to deport resident noncitizens. Yet, the manner in which states ensure that the exercise of the deportation power comports with these limits varies greatly. Within western democratic states, two models for achieving this goal are identifiable: the immigration regulation is political model and the immigration regulation is legal model. These models differ in the manner in which immigration-related rights are allocated and the role of the judiciary and administrative adjudicative bodies in monitoring and evaluating state immigration decisions.

[*] David Kaye did not submit remarks for the *Proceedings*.

[†] Assistant Professor of Law, William & Mary School of Law.

[1] The use of the term "European states" refers to Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and United Kingdom—the twenty-seven member states of the European Union. *See* European Union, European Countries, *available at* <http://europa.eu/abc/european_countries/index_en.htm> (last visited Feb. 7, 2009).

[2] Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (J. Brewer dissenting).

[3] Kees Groenendijk, Elspeth Guild, & Halil Dogan, Security of Residence of Long-Term Migrants: A Comparative Study of Law and Practice in European Countries 5 (1998).

The political model allocates immigration-related rights based on citizenship status, while the legal model allocates these rights based on affiliation with the state of residence. While only citizens have the right to enter and are the only individuals not subject to deportation grounds within the political model, these rights regarding entry and protection from deportation are granted to noncitizens with significant affiliation with the state of residence within the legal model. Within both models, non-immigration related rights are allocated based on an individual's status as a person physically present within the territory of a state. Yet, the ability of noncitizens to use non-immigration related rights to challenge deportation decisions is very different within the two models because of the jurisdiction of the courts and the administrative adjudicative bodies and the standards of review utilized by reviewing courts.

The judiciary and administrative adjudicative bodies play very different roles in monitoring, evaluating, and constraining state use of the power to deport noncitizens. Within the political model, the judiciary is not responsible for monitoring, evaluating, or constraining the political branches in their exercise of the power to deport noncitizens. Both the creation of the plenary power doctrine in the late nineteenth century and separation of powers concerns gave rise to this limited judicial role in reviewing deportation decisions. Judicial bodies play a much more active role in reviewing deportation decisions within the legal model. Supranational judicial bodies like the European Court of Human Rights (ECHR) and domestic administrative adjudicative bodies, like the Raad van State in the Netherlands or the Council of State in France, analyze allegations of deportation-related ECHR rights violations utilizing proportionality review without recourse to the margin of appreciation doctrine. These adjudicative bodies balance the interests of the state in effectuating a deportation order with the rights of the noncitizen subject to deportation. This process provides an opportunity to monitor, evaluate, and, if necessary, constrain the state's use of the power to deport. The legal model provides institutional mechanisms to ensure that state decision-making regarding deportation is not arbitrary and that it adheres to law, both the domestic requirements for deporting a noncitizen and the international legal limits upon the state's power to deport noncitizens.

These international legal limits are relatively new within international law, and they are generally implicit rather than explicit, although regulation by the European Union is creating more explicit limits.[4] At the time that the United States created the plenary power doctrine, international law provided very few limits on a state's sovereign power to exclude and expel noncitizens. Treatment of individuals, citizens and noncitizens alike, within the territory of a state was considered to be within the state's domestic jurisdiction, which was outside of the reach of international law. The idea that states had absolute sovereignty to exclude and expel noncitizens, while debatable in the late nineteenth century, was not viable by the late twentieth century due to the prominence of human rights treaties. Both the political model and the legal model reflect the international legal norms and rules governing at the time of the model's development. The late nineteenth century creation of the political model reflects the idea of absolute sovereignty and individuals as objects within international law. The development of the legal model in the late twentieth century reflects the transformation of individuals into subjects of international law due to the ratification of human rights treaties.

As rights holders, independent of states, individuals have the ability to challenge state deportation decisions to ensure compatibility with domestic immigration legal requirements

[4] The explicit limits created by the European Union directives are based on the implicit limits created by Article 8 of the ECHR and the relevant decisions by the European Court of Human Rights. Council Directive 2003/86, 2003 O.J. (L 251) 12 (EC) (addressing right to family reunification); Council Directive 2003/109, 2004 O.J. (L 16) 44, at arts. 12 (EC) (concerning status of third-country nationals who are long-term residents).

and international legal norms and rules regarding the scope of states' immigration power. The acknowledgment of individuals as rights holders and the requirement that state parties to human rights treaties provide judicial, administrative, or legislative review of alleged rights violations and effective remedies for rights violations supported the creation of the legal model. This model provides institutional mechanisms for monitoring, evaluating, and constraining, when appropriate, state use of the deportation power. The political model as applied in the United States does not provide such institutional mechanisms. The United States is lacking judicial and administrative mechanisms to ensure that deportation decisions adhere to substantive domestic law and comport with international legal norms and rules regarding the scope of a state's sovereign power to deport. This lack of oversight increases the risk of arbitrary deportation decisions, which ultimately undermines the rule of law in the regulation of immigration.

Interpreting the Immigration and Nationality Act provisions regarding cancellation of removal or issuing an Executive Order requiring executive officials to perform their functions "so as to respect and implement," U.S. international human rights obligations offer two executive-focused approaches that begin to reduce the lack of monitoring, evaluating, and constraining of state use of the deportation power. These approaches do not solve the problem completely, but they do provide examples of the type of executive action that assists in facilitating the rule of law goals articulated in human rights treaties. The United States' international legal obligations have changed substantially since *Chae Chan Ping*, *Ekiu*, and *Fong Yue Ting* were decided. These new legal developments demand a reevaluation of the manner in which immigration judges and the Board of Immigration Appeals adjudicate deportation challenges and requests for cancellation of removal to ensure that the factors considered, and the balancing conducted, continues to accurately reflect international legal obligations and the status of individuals within international law to prevent arbitrary decision-making.

The Definition of a Legitimate Target of Attack: Not More than a Moral Plea?

*By Janina Dill**

Two leitmotivs dominate the professional and academic discussion of recent U.S. military operations: criticism that U.S. practices inflict unacceptable harm on civilians, on the one hand, and praise for the subjection of every aspect of combat operations to legal review, on the other hand. In Afghanistan, the use of air strikes against insurgents has been widely condemned as causing excessive harm to civilians. Yet, this criticism is leveled against the same military that is credited with waging war legalistically: an appraisal that is not only forcefully promoted by the U.S. military and political establishment, but also finds support in a closer examination of the military's institutional set-up and organizational culture. Many commentators consider this to be an indication of both the effectiveness of international humanitarian law (hereinafter "IHL") as well as the normative adequacy of U.S. warfare.

The coincidence of popular outrage regarding the harm inflicted on civilians during combat operations and commendation of the latter's comprehensive subjection to legal regulation presents a puzzle. Of course, either the impression that the United States makes an extraordinary effort to adhere to IHL or the notion that the civilian suffering resulting from U.S.

* Dphil Student in International Relations, University of Oxford.

warfare is worthy of criticism could be wrong. In this presentation, I consider the possibility that both perceptions are valid and investigate whether IHL gives due weight to the protection of civilian life, to its own "human side," amidst other imperatives in the regulation of combat operations.

Judging law in light of the behavior it sanctions presupposes that the law is determinate and clear. Establishing the law's determinacy, i.e., drawing the boundaries of acceptable interpretations, is hence logically prior to investigating the weight given by law to any substantial concern. IHL is not founded on one straightforward principle, but on a compromise between military and humanitarian imperatives. However, the object and purpose of a law is an important interpretive guideline. Most lawyers assume that laws have a core meaning and that it is for cases at the margin that the object and purpose of a law is most relevant. According to legal doctrine, it is the object and purpose that delimits the boundary between possible interpretations of, and a deviation from, a rule because an interpretation *contra legem* is always invalid.

In the absence of one single object and purpose, such as to render war humane or to allow the stronger party to win, the interpretation of most of the rules of IHL is necessarily a balancing act. Any interpretation that tilts toward military concerns will be criticized for its potentially apologetic implications. However, an equally valid point can be made against an interpretation that gives in to moral considerations to an extent that renders the law too restrictive and compliance too costly, thus potentially jeopardizing the effectiveness of IHL.

According to Martti Koskenniemi's influential explication of the structure of international legal argument, all international law encounters the necessity to be strictly traceable to and rooted in individual states' consent, while at the same time creating binding obligations to follow the normative principles that it embodies for all states notwithstanding their sovereign will.[1] IHL, and at its heart the definition of a legitimate target, has both potential apology (automatic deference to military necessity) and potential utopia (rendering war humane) built right into its telos. The very idea that armed conflict can be regulated by law hinges on the law's ability to reconcile its acknowledgment of the logic of military necessity with its task to protect the innocent individual's right to freedom from harm.

One could argue that the object and purpose of IHL is thus to strike a balance between humanitarian concerns and military necessity, but that merely refers the problem back to the textual level, on which the law can prescribe ways how to do so. A closer look at the provisions defining a legitimate target of attack reveals that the mechanism devised to balance often competing imperatives in combat reproduces the tension between them at a different level. The rules of targeting contain deontological aspects, the intent to follow the imperative of distinction and to abide by certain process requirements to that effect, as well as a consequentialist aspect: a narrow enough notion of proportionality. Proportionality is the only prescription regarding the results of targeting, and hence the only clue for a normative standard of civilian protection in the regime on targeting. However, proportionality compares dissimilar values (military advantage and human life). It thus poses the same fundamental question of how to balance military and humanitarian concerns that underlies the entire legal regime. A prescription to balance potentially contradictory imperatives resists translation into a watertight *ex post* test as well as a workable *ex ante* guideline. Even a military commander deciding in good faith has to rely on personal judgment to establish what he or

[1] Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (1989).

she considers a proportionate anticipated loss of human life in relation to the expected military advantage.

The concept of military advantage suffers from its own two-fold indeterminacy, which is manifest in a long-standing controversy regarding the interpretation of Article 52 of Additional Protocol I to the Geneva Conventions. The first question arising in any attempt to operationalize the criterion of military advantage concerns the necessary degree of nexus between an act of destruction or neutralization and the said advantage. The ICRC commentary requires "a concrete and perceptible military advantage rather than a hypothetical one."[2] Official U.S. doctrine, on the other hand, embraces as a valid interpretation of Article 52(2) that the destruction of an object contributing to the adversary's war-sustaining effort would yield a definite military advantage.

Secondly, the appropriate frame of reference to determine a military advantage is subject to differing interpretations. U.S. military manuals state that the military advantage refers to the advantage anticipated from the attack considered as a whole, and not only from isolated or particular parts of the attack. The interpretation that military advantage is not restricted to tactical gains, but is linked to "the full context of war strategy"[3] goes only a little further but seems to come closer to conflicting with the ICRC commentary that stipulates that "an attack as a whole is a finite event, not to be confused with an entire war."[4]

A direct consequence of the frame of reference used for the determination of a military advantage is the nature of the advantage achieved. Even though a literal interpretation of Article 52.2 suggests that the advantage has to be genuinely military, the lines between military and political advantage are blurred if the objective of an intervention is not primarily to defeat the adversary militarily but to bring about a change in political behavior, as in the case of NATO's bombing campaign against the Federal Republic of Yugoslavia. Both facets of indeterminacy of the concept of military advantage point toward the same problem.

The notion of an advantage is devoid of meaning, unless it can be explained in terms of a contribution to the achievement of a stated goal. Yet, there is a strict boundary between *jus in bello* and *jus ad bellum* considerations. In order for IHL to equally apply to all parties to an armed conflict regardless of their respective cause, the law resists any linkage of conduct in war to the causes for which it is fought. Just as the law is blind before the adversaries' moral causes, their political goals in fighting a war are inadmissible as arguments regarding the application or interpretation of a *jus in bello* rule. IHL thus rests on the idea of a sequencing of politics and the use of armed force. Once parties engage in armed conflict, they have to "bracket" their political objectives, as military victory is assumed to later translate into the achievement of political goals. By implication, "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."[5]

The narrowest interpretation of both criteria for the determination of a military advantage — the necessary degree of nexus and the frame of reference—rests on the notion that there is a purely military sphere disconnected from the political context of an armed conflict, within which advantage can be defined in purely military, i.e., tactical terms as the stated goal is

[2] YVES SANDOZ, CHRISTOPHE SWINARSKI & BRUNO ZIMMERMANN, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 2209 (1987).

[3] DOD OFFICE OF GENERAL COUNCIL, AN ASSESSMENT OF INTERNATIONAL LEGAL RULES IN INFORMATION OPERATIONS 7 (1999).

[4] SANDOZ ET AL., *supra* note 2.

[5] St. Petersburg Declaration of 1868, Preamble ¶ 2.

military defeat of the adversary. The observable tendencies to broaden the interpretation of military advantage along the two mentioned lines are correspondingly attempts to tear down this fictitious barrier between the *in bello* and the *ad bellum*—and also the *post bellum*—sphere and to define a military advantage in accordance with what a war is ultimately meant to achieve: a political goal.

Taken together, the barrier between its regulative sphere and the moral and political context (between the *jus in bello* and all *ad* or *post bellum* considerations) and the absence of a regulative object and purpose create a vacuum of meaning. IHL neither allows the parties to behave fully in accordance with their political interests and goals (and accordingly follow a strategic imperative), nor does it really require them to strive for a morally just cause (and accordingly follow a humanitarian imperative).

It is for very good reasons that the legal regime draws this line between the legality of acts within a war and both the moral causes and the political reasons for it. Likewise, there are compelling arguments why the law should abstain from giving precedence to either the humanitarian or the military imperative. In a way, the law thereby resists the lure of apology (to confer legitimacy on the logic of military necessity in order to achieve political goals through warfare) and utopia (to legalize the notion of a just war fought in a morally defensible way). Yet, it comes at a high price, namely a high degree of indeterminacy, even a semantic emptiness, of the notion of military advantage, which is at the heart of both the obligation to distinguish as well as the proportionality calculus.

This panel is concerned with "Issues in the Human Side of International Law." As the protection of civilians is an important goal of the legal regulation of armed conflict, a certain salience of IHL's human side is implied in the very notion of the rule of law in war. While crucial for its normative success, IHL's behavioral relevance can be impaired by too heavy an emphasis on this human side. After all, IHL has to regulate warfare in a way that allows a law-abiding belligerent to win. Any observed shortfall in the protective capacity of IHL is usually attributed to deference to this countervailing imperative and its prioritization over humanitarian concerns in IHL. In the presentation, I investigate how the law balances humanitarian and military imperatives in the definition of a legitimate target of attack. I conclude that rather than suffering from an underdeveloped human side, IHL, as it relates to targeting, suffers from an extremely high degree of indeterminacy that explains why adherence to IHL does not guarantee a certain level of civilian protection in combat operations.

SECRECY AT THE INTERNATIONAL CRIMINAL COURT

*By Alex Little**

The International Criminal Court is hiding something.

Secrecy at the Court is pervasive: the Prosecutor has secured a substantial volume of evidence by agreeing to keep it confidential; the Pre-Trial and Trial Chambers have limited access to information in every situation and case before them; countless court documents remain under seal, while redactions obscure large portions of those released to the public; in public documents, victims are identified only by anonymous numbers; meanwhile, the Prosecutor's initial analysis of cases and his investigations proceed almost entirely behind closed doors.

* Assistant U.S. Attorney, U.S. Attorney's Office for the District of Columbia. The views expressed in these remarks are solely those of the Author and do not necessarily represent the views of the U.S. Department of Justice or the United States.

To be sure, the fact that the Court has secrets is not very surprising, nor is it nefarious. Secrecy, as I employ the term, includes protective measures, promises of confidentiality, classification structures, and all similar methods that the organs of the Court employ to withhold information from defendants, the public, and each other. Understood in this manner, secrecy is essential to the Court's effective operation. Each organ of the Court grapples with questions of secrecy on a daily basis, choosing to disclose or conceal information in myriad ways for myriad reasons.

Although the practice of secrecy at the Court is often mundane, already it has proven important and controversial. Consider the very public suspension of the Court's first trial, proceeding against Congolese warlord Thomas Lubanga Dyilo. The stay in proceedings was due entirely to a dispute over the limits and purposes of secrecy. In short, the judges presiding over the trial held that the Prosecutor improperly promised confidentiality to many of those who provided him with evidence, under Article 54(3)(e) of the Rome Statute, rendering it impossible for the defendant to access exculpatory evidence and thereby hindering his defense. The judges' decision also reflected concern over the Prosecutor's unwillingness to allow them access to the same evidence; they bristled at the arrangement.

My paper explores the problems that the *Lubanga* decision makes plain. As a preliminary manner, I argue that all of the secrecy measures at the Court can be understood as falling within one of three categories: investigative, protective, and deferential.

The first two categories should be familiar. Investigative secrecy prevents the flight of offenders, the destruction of evidence, and tampering of witnesses, while encouraging witnesses to provide their full knowledge of crimes. In short, it is those secrecy measures that assist the Prosecutor in doing his job. Protective secrecy is similarly common: it involves those secrecy measures that protect innocent witnesses, victims, and the accused from emotional and physical harm. This category of secrecy also includes those measures, such as evidentiary privileges, which protect the rights of the accused.

The third category of secrecy is something altogether different. Deferential secrecy, which might be better called political secrecy, consists of those secrecy measures employed by the Court that safeguard national security information, respect states' sovereign rights and interests, and respect the rights and interests of organizations, such as the International Committee of the Red Cross.

Notably, deferential secrecy applies more broadly than national security information and Article 72 of the Rome Statute. A good part of the Court's secrecy regime is intended to respect a state's sovereignty and its interests beyond the remit of the Court. A few examples include the presumption in Article 93 that information received in response to requests for cooperation is confidential, the ability of a state to intervene under Article 68 to request protective measures and keep its officials off the witness stand, and the requirement in Article 19 that the Prosecutor not disclose any information he receives about national proceedings when monitoring an Article 17 deferral. Perhaps surprisingly, deferential secrecy extends to organizations as well. Article 73 is the best example, as it provides protection to third-party information in the custody of states parties when the Court requests such information, even if that third-party is an intergovernmental or international organization rather than a state. Another example is Rule 73, which carves out a privilege specifically to prevent the testimony by "any present or past official or employee of the International Committee of the Red Cross." You cannot explain Rule 73 without a concept like deferential secrecy.

I argue that these categories are important because they allow a better understanding of the tensions that are present between secrecy and disclosure. There are a number of problems

that can arise when the Court's secrecy regime results in either too much or not enough secrecy. Many of these dilemmas arise in any system of criminal justice that attempts to balance disclosure and secrecy, such as the tension between providing defendants with access to information and hindering the ability of prosecuting authorities to gather evidence and protect victims and witnesses.

The Court also confronts more unique problems that arise only in the context of a permanent international criminal court. One example is how to balance secrecy and disclosure when the Court's relationships with external parties, such as states, international organizations, and the public, are at stake. Too much secrecy, and states cannot adequately prepare to assist the Court. Not enough secrecy, however, and states (and international organizations) quickly lose interest in providing information to the Prosecutor or complying with his requests for cooperation.

How, then, does the Court strike the proper balance? I argue that, in response to the unique secrecy problems the Court faces, the Court can strike the balance between too much and not enough secrecy only by taking into account its unique role as a permanent international criminal court. It can do this by considering three factors that apply to it but not to prior international tribunals or domestic courts: (1) the primary importance of deferential secrecy to the Court's institutional viability, (2) the increased difficulty of its investigations and the overwhelming vulnerability of victims in light of the gravity and scope of its cases, and (3) the Court's peculiar need for public confidence.

First, when the Court considers secrecy issues, it must recognize the primary importance of deferential secrecy to its institutional viability. The Court relies on states parties to accomplish virtually all of the activities required to administer international criminal justice beyond the courthouse walls, from executing arrest warrants to granting permission for the Court's investigators to operate on their territory. The Prosecutor likes to say he has no police force when explaining why he cannot arrest Bashir. But the reality is even starker: he has his staff, some office supplies, telephones, and access to the press. The rest is up to the states parties. To put it plainly, if the Court fails to be sufficiently deferential to the needs and interests of states, particularly in the application of deferential secrecy measures, it will not be long for this world.

Second, the Court should not underestimate the increased difficulty of its investigations and the overwhelming vulnerability of victims in light of the gravity and scope of its cases. So far, all of the organs of the Court appear fully cognizant of the challenges they face, particularly as they relate to safety. With cases in places like Uganda, the Democratic Republic of Congo, and Sudan, those challenges are hard to miss. But the Court's judges do not appear to fully appreciate the obstacles the Prosecutor must navigate in these countries in order to investigate a case and develop evidence for trial. There is a real danger that the Prosecutor will lose sources of information previously available to him, as organizations and witnesses lose confidence in his ability to keep their cooperation a secret.

Third, the Court must not lose sight of the fact that, as an international treaty organization, it has a peculiar need for public confidence. Losing the public's confidence—by appearing too beholden to the interests of certain states, overzealous in its pursuit of a particular target, or in any other manner—can translate quickly into an inability to get the cooperation the Court needs from states parties. As a result, the Court cannot forego consideration of how the public will perceive the secrecy measures it employs.

If the Court fails to consider these factors when it confronts dilemmas related to secrecy, as it did in the *Lubanga* case, it will have a great deal of difficulty fashioning a coherent secrecy regime that serves its mission and promotes its values.

That said, I should end on a different note. By arguing that the Court should account for these factors and more readily recognize the need for and importance of deferential secrecy, I am not arguing that it should trample defendants' rights—a balance can, and should, be struck. In the early operation of the Court, however, the scale has been tilted in the opposite direction, and the Court has betrayed a troubling lack of self-awareness. What I am proposing is that the Court, when it considers secrecy issues, should take measure of its unique role in the international community and the interests of that community in its continued operation.

A court without secrets is a court without cases, and that is not a future to which the International Criminal Court should aspire.

Scales of Law: Rethinking Climate Change, Terrorism, and the Global Financial Crisis

By Hari M. Osofsky[*]

My presentation focused on a project that I am still in the early stages of conceptualizing, a monograph that I have tentatively entitled: "Scales of Law: Rethinking Climate Change, Terrorism, and the Global Financial Crisis." This book will attempt to bring together the geography and legal literatures on regulatory scale to rethink how law can most effectively address problems that cross-cut traditional legal orderings. My talk provided an overview of the overarching concept, reviewed the topics that I plan to cover in the monograph, and provided some of my early thinking on what I term diagonal regulation (approaches that simultaneously cross-cut horizontal (same level) and vertical (multi-level) legal orderings). In the interest of space, this summary of my presentation includes only a portion of the conceptual overview and omits the rest of the talk.

The U.S. legal system delineates levels of governance—local, state, national, regional, international—but issues actually take place at multiple levels. Most obviously, its federal system of government creates constant contestation over whether regulation should occur at state or national levels.[1] However, such well-defined disputes are only the tip of a very large iceberg looming under the waters of legal discourse. With the rapid pace of globalization, the intertwining of law, society, culture, and economy at different levels of governance has only become more marked.

Although a growing interdisciplinary literature grapples with this interconnectedness and with the implications of globalization,[2] a major gap in that conversation remains. Namely, little dialogue has occurred between law scholars and geography scholars on the question

[*] Associate Professor, Washington and Lee University School of Law. I very much appreciated the organizing efforts of David Kaye and Sandy Sivakumaran, and the thoughtful interchange at the New Voices panel. I also would like to thank Patrick (Bart) Bartlein, Susan Hardwick, Andrew Marcus, Alexander Murphy, and Kyu Ho Youm for their ongoing feedback on this project as part of my Ph.D. work in the University of Oregon's Geography Department. As always, I am very grateful for the loving support of Josh, Oz, and Scarlet Gitelson.

[1] An in-depth review of the federalism literature is beyond the scope of this brief summary. For an example of geography literature on scale and federalism, see Dennis R. Judd, *The Case of the Missing Scales: A Commentary on Cox*, 17 POL. GEOGRAPHY 29, 30-31 (1998) (analyzing effect of federalism in United States).

[2] For a discussion of the discourse over law and globalization, see David Held & Andrew McGrew, *The Great Globalization Debate: An Introduction*, *in* THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE 1 (David Held & Andrew McGrew, eds., 2d ed., 2003); *see also* Terence C. Halliday & Pavel Osinsky, *Globalization of Law*, 32 ANN. REV. SOCIOLOGY 447 (2006).

of scale. As we grapple with regulatory problems that cross-cut levels of governance, we must struggle with the sticky, scalar nature of law. We divide law into fixed levels of governance, a sensible move to create an orderly regulatory system, but as a result, we often do not deal very well with problems that require engagement at multiple levels, which many pressing problems do.

Over the past two decades, an extensive body of work has emerged in geography that asks basic questions about what scale is and how it interacts with society.[3] Yet, this scholarship's analysis of law is often quite thin, and legal commentators' rarely grapple significantly with this literature or engage explicitly the issues raised by it. Even the developing law and geography scholarship tends to focus more on space and place than on scale.[4]

This book aims to fill that conceptual lacuna. It will explore what geographers and lawyers could learn from one another regarding law and scale, with an emphasis on the ways each is constitutive of the other. In so doing, it will focus on four main dilemmas: (1) What are the boundaries of law and of scale?[5] (2) To what extent are legal scales fixed or fluid?[6] (3) How does, and should, the territorial extent of a legal entity compare with the scale of the problems that it considers?[7] (4) What is the nature of the rescaling processes that take place in the creation, implementation, and interpretation of law?[8]

The monograph will engage these questions and provide possible answers to them by focusing on three contemporary problems that are rarely treated together: climate change, terrorism, and the global financial crisis. These problems cross-cut our existing levels of governance—they are simultaneously individual, community, local, state, national, regional,

[3] For examples of those debates, see Sallie A. Marston, *The Social Construction of Scale*, 24 PROGRESS IN HUMAN GEOGRAPHY 219 (2000), and dialogue over that piece in Neil Brenner, *The Limits to Scale? Methodological Reflections on Scalar Structuration*, 25 PROGRESS IN HUMAN GEOGRAPHY 591 (2001), and Sallie A. Marston & Neil Smith, *States, Scales and Households: Limits to Scale Thinking? A Response to Brenner*, 25 PROGRESS IN HUMAN GEOGRAPHY 615 (2001). In addition, see Sallie A. Marston, John Paul Jones III & Keith Woodward, *Human Geography Without Scale*, 30 TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 416 (2005), and responses to it, Scott William Hoefle, *Eliminating Scale and Killing the Goose that Laid the Golden Egg?*, 31 TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 238 (2006), and Chris Collinge, *Flat Ontology and the Deconstruction of Scale: A Response to Marston, Jones, and Woodward*, 31 TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 244 (2006).

[4] For example, recent anthologies on law and geography do not have a major emphasis on scale. *See* LAW AND GEOGRAPHY (Jane Holder & Carolyn Harrison eds., 2003); THE LEGAL GEOGRAPHIES READER: LAW, POWER AND SPACE (Nicholas Blomley, David Delaney & Richard T. Ford eds., 2001).

[5] The legal pluralist literature, for example, engages the importance of addressing the multiple normative communities—formal and informal—that share social spaces. Robert M. Cover, *The Supreme Court 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); *see also* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988); Emmanuel Melissaris, *The More the Merrier? A New Take on Legal Pluralism*, 13 SOC. & L. STUDIES 57 (2004); Ambreena Manji, *"Like a Mask Dancing": Law and Colonialism in Chinua Achebe's Arrow of God*, 27 J. LAW & SOC'Y 626 (2000); Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189 (2001). Similarly, the New Haven School of International Law views law as "a process of authoritative decision by which members of a community clarify and secure their common interests" and argues that "humankind today lives in a whole hierarchy of interpenentrating communities, from the local to the global." HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY, at xxi (1992).

[6] For discussion of issues of fixity and fluidity in the geography literature, see Kevin R. Cox, *Spaces of Dependence, Spaces of Engagement and the Politics of Scale, Or: Looking for Local Politics*, 17 POL. GEOGRAPHY 1, 20-21 (1998); David Delaney & Helga Leitner, *The Political Construction of Scale*, 16 POL. GEOGRAPHY 93, 93 (1997); Andrew Herod, *Scale: The Local and the Global*, *in* KEY CONCEPTS IN GEOGRAPHY 229, 234 & 242 (Sarah L. Holloway, Stephen P. Rice & Gill Valentine, eds., 2003); Deborah G. Martin, *Transcending the Fixity of Jurisdictional Scale*, 17 POL. GEOGRAPHY 33, 35 (1998); Anssi Paasi, *Place and Region: Looking through the Prism of Scale*, 28 PROGRESS IN HUMAN GEOGRAPHY 536, 542-43 (2004); Neil Brenner, *Between Fixity and Motion: Accumulation, Territorial Organization and the Historical Geography of Spatial Scales*, 16 ENVT. AND PLANNING D: SOC'Y AND SPACE 459, 461 (1998); Erik Swyngedouw, *Excluding the Other: The Production of Scale and Scaled Politics*, *in* GEOGRAPHIES OF ECONOMIES 167, 169 (Roger Lee & Jane Wills, eds., 1997); Erik Swyngedouw, *Neither Global nor Local: "Glocalization" and the Politics of Scale*, *in* SPACES OF GLOBALIZATION: REASSERTING THE POWER OF THE LOCAL 137, 141 (Kevin R. Cox ed., 1997).

and international problems—and law has not yet figured out how to address any of them particularly effectively. The book will navigate these dilemmas by considering how each level of governance does and should regulate these problems, and the possibilities for diagonal regulatory strategies to address them.

[7] For analyses of issues of extent and resolution, see Robert B. McMaster & Eric Sheppard, *Introduction: Scale and Geographic Inquiry, in* SCALE AND GEOGRAPHIC INQUIRY: NATURE, SOC'Y AND METHOD 1, 5 (Eric Sheppard & Robert B. McMaster, eds., 2003); Nathan F. Sayre, *Ecological and Geographical Scale: Parallels and Potential for Integration,* 29 PROGRESS IN HUMAN GEOGRAPHY 276, 281 (2005); Neil Smith, *Geography, Difference and the Politics of Scale, in* POSTMODERNISM AND THE SOC. SCIENCES 57, 73-74 (Joe Doherty, Elspeth Graham & Mo Malek, eds., 1992).

[8] For an example of an in-depth examination of those processes, see NEIL BRENNER, NEW STATE SPACES: URBAN GOVERNANCE AND THE RESCALING OF STATEHOOD 9 (2004).